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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 711 AND 721.

BENJAMIN F. JOHNSON,
Petitioner,
LOUIS A. BOYER,
Petitioner-Intervenor,
against
MANHATTAN RAILWAY COMPANY, *et al.*
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT, INTERBOROUGH RAPID TRANSIT COMPANY.

JAMES L. QUACKENBUSH,
Counsel for Respondent,
Interborough Rapid Transit Company.

LOUIS S. CARPENTIER,
J. OSGOOD NICHOLS,
of Counsel.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT, INTERBOROUGH RAPID TRANSIT COMPANY.

This is a review upon writs of certiorari, granted upon the petitions of the complainant, Benjamin F. Johnson, and

intervener, Lillian Boehm, in the first above-entitled suit, of a decree of the Circuit Court of Appeals for the Second Circuit, entered on the 14th day of December, 1932, upon a unanimous decision reversing three decrees of the District Court of the United States for the Southern District of New York. The first decree of the District Court, entered on the 20th day of September, 1932 (R. 7), granted leave to the petitioner to file the bill of complaint in the first above-entitled Johnson suit against Manhattan Railway Company and the Receiver thereof, Interborough Rapid Transit Company and the Receivers thereof, The City of New York and American Brake Shoe and Foundry Company. The said Receiver of Manhattan Railway Company and Receivers of Interborough Rapid Transit Company were appointed in the second above-entitled suit, *The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company* (hereinafter referred to as the *American Brake Shoe* case). The second decree, entered on the 18th day of October, 1932 (R. 722), directed the consolidation of the said suits under the caption *"In the Matter of the Interborough-Manhattan Receivership Proceedings"*; and the third decree, entered on the 18th day of October, 1932 (R. 725), vacated and set aside, as wholly void and of no juridical effect, the orders appointing Receivers of Manhattan Railway Company and Interborough Rapid Transit Company, and other orders made by Hon. Martin T. Manton in the District Court in the *American Brake Shoe* case. Thereupon, and on the 20th day of October, 1932, the parties to the *American Brake Shoe* case, the Receivers appointed therein, and various interveners therein, appealed from each of the above-mentioned decrees rendered in the District Court to the Circuit Court of Appeals for the Second Circuit,

where the appeal was heard on the 14th day of November, 1932, upon oral argument resulting in the decision and decree here under review.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Second Circuit reversing the decrees of the District Court is reported in *61 F. (2d) 934*. The opinion delivered by United States District Judge John M. Woolsey in awarding the second and third above-mentioned decrees is reported in *1 F. Supp. 809*.

Statement of the Case.

Interborough Rapid Transit Company is a railroad corporation organized under the laws of the State of New York for the purpose of operating rapid transit railroads in the City of New York (R. 154). For many years it has been engaged in operating a large system of municipally-owned subways constructed partially at the expense of the Interborough Company under contracts with the City of New York (R. 154-156).

Manhattan Railway Company, also a railroad corporation organized under the laws of the State of New York, is the owner of a system of elevated railroads in the City of New York. In the year 1903 the Manhattan Company leased its system to the Interborough Company, which thereafter, until the appointment of the Receivers here involved, was engaged in the operation of said Manhattan elevated leased system, together with certain elevated extensions constructed and owned by the Interborough Company (R. 156-157). The Interborough

Company had engaged in the operation of its combined system a staff of officials and employees numbering more than 18,000 (R. 176, 561). The continued and safe operation of the elevated and subway lines is of vital importance to the people of the City of New York, a total of more than 1,000,000,000 passengers having been carried during the preceding year upon the rapid transit railroads operated by the Interborough (R. 166, 561). The investment of the City of New York alone in municipally-owned subway lines operated by the Interborough Company is reliably stated to be in excess of $300,000,000 (R. 561).

On August 26, 1932, the American Brake Shoe and Foundry Company, a Delaware corporation, filed a bill in equity in the District Court of the United States for the Southern District of New York, against the Interborough Company, alleging that the defendant was indebted to it in the sum of $27,530.89, payment of which had been refused (R. 164), and setting forth that the Interborough Company had outstanding Ten-Year Secured Convertible Seven Per Cent. Gold Notes, principal $31,672,100, and interest $1,108,523.50, due September 1, 1932, and Ten-Year Unsecured Six Per Cent. Gold Notes, principal $10,500,000, and interest $315,000, due October 1, 1932 (R. 159, 165). The bill of complaint further set forth various additional items of indebtedness of the Interborough Company, including certain specific interest, rental and sinking fund obligations amounting to upwards of $5,500,000 accruing at different times not later than January 1, 1933, and also sundry large public and contractual obligations of a pecuniary nature (R. 158-166). While it appeared that the Interborough Company had assets which at a fair valuation exceeded the amount of its liabilities (R. 166), it was alleged, in substance, that the company was clearly without financial resources to meet the fore-

going imminently maturing security and rental obligations, aggregating more than $44,000,000, in the ordinary course of business as they became due (R. 165-166). The bill asked, therefore, for the appointment of receivers of the Interborough Company (R. 168). On the same day, the Interborough Company filed its answer admitting the allegations of the bill of complaint and consenting to a decree appointing receivers (R. 171). The filing of this answer was authorized and directed by a resolution of the board of directors of the Interborough Company adopted August 25, 1932, setting forth particularly as a reason therefor the maturity of $31,672,100 of the 7% notes of the Company on September 1, 1932, which, as was further specifically stated in the resolution of the board of directors, the Company would be unable to pay and which probably could not be extended (R. 173). In this connection it should be pointed out that an element which may be assumed to have influenced materially this action of the board of directors was the fact that the Courts of the State of New York had sustained the right of individual holders of these notes to bring suit thereon against the Company (*General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794; affd. 235 N. Y. 133), by reason of which, after September 1, 1932, the company would have been threatened with numerous suits on the part of noteholders. At the same time, counsel submitting this brief on behalf of the Interborough Company, who had been attorney and counsel for that company for the past twenty-five years, being of opinion that the adequate management and operation of the extensive subway and elevated railroads of the Interborough system, the public relations, interests of the City of New York, and various complex questions involved in the administration of an equity receivership for the company

demanded the services of individual receivers, made an affidavit to that effect (R. 175). The foregoing bill of complaint, answer and affidavit were submitted to Hon. Martin T. Manton, Senior Circuit Judge of the Second Circuit, by counsel for the complainant and for the Interborough Company, who stated the facts, showing the urgent necessity for the appointment of individual receivers. Acting pursuant to Section 22 of Title 28 of the United States Code, Judge Manton made an order, under date of August 25, 1932, designating and assigning himself "to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Co. vs. Interborough Rapid Transit Company," the designation containing the usual recital of "public interest" (R. 177). Upon the filing of the bill of complaint and answer on August 26, 1932, in the *American Brake Shoe* case, Judge Manton made an order appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers of the Interborough Company therein (R. 180), which appointment was continued by order of September 28, 1932 (R. 223). On the same day, a bill of complaint for the appointment of ancillary receivers of the Interborough Company was filed by The American Brake Shoe and Foundry Company in the District Court for the Eastern District of New York, in which District many miles of subway railroads operated by the Interborough Company are located (R. 574), and, upon such bill and an answer admitting the allegations thereof and consenting to such appointment, Judge Dowling and Mr. Murray were also appointed temporary ancillary receivers

in that District by United States District Judge Marcus B. Campbell (R. 583). Thereafter, representatives of the principal creditors of the Interborough Company intervened in the suit, as did also the Manhattan Railway Company, a receiver of the latter company being appointed upon allegations showing the necessity therefor.

On September 21, 1932, the petitioner, Benjamin F. Johnson, a citizen of the State of Kentucky and a shareholder of Manhattan Railway Company, upon obtaining leave from United States District Judge Francis G. Caffey (R. 7), filed his bill of complaint in the first above-entitled action in the District Court for the Southern District of New York (R. 13) against the Manhattan Railway Company, the parties to the *American Brake Shoe* case, the receivers appointed therein, and the City of New York; and, on the same day, the petitioner, Lillian Boehm, a citizen of the State of New York, alleging herself to be a holder of stock and bonds of Manhattan Railway Company and bonds and notes of the Interborough Company, was permitted to intervene in said Johnson suit (R. 137, 139). The Johnson suit is in equity, and the bill of complaint (R. 13) sets forth the financial obligations of the Interborough Company (R. 22-23) and avers that "there is special and imperative need for having receivers for the Interborough and Manhattan" (R. 24), but alleges that such receivers should be "independent and disconnected with the old management of said companies." The bill further sets forth the pendency of the *American Brake Shoe* suit and does not question the truth or sufficiency of the allegations of the bill of complaint showing therein the necessity for the appointment of receivers of the Interborough Company; but the Johnson bill alleges that the designation of Senior Circuit Judge Manton to hold a District Court was unauthorized, and that the appointment

of receivers in the *American Brake Shoe* suit was "irregular, without warrant or legal authority, and void," on the ground that it was made in violation of two rules promulgated by the United States District Court for the Southern District of New York, which rules are set forth in full in the bill (R. 16). The Johnson bill further alleges that, at the time of the application for the appointment of receivers of the Interborough on August 26, 1932, and the later application for receivers of the Manhattan, "there was a United States District Judge duly assigned and sitting in the Motion Part of the Court, *as well as other District Judges of the United States District Court who were ready, able and willing to entertain the applications for equity receiverships of said Interborough and Manhattan*" (R. 17).* The Johnson bill further alleges that "*there is a grave and dangerous possibility of said receiverships of Interborough and Manhattan being set aside*, inasmuch as Circuit Court Judge Martin T. Manton had no power or jurisdiction to entertain said receivership proceedings" (R. 36), and the relief asked is that the orders of Judge Manton in the *American Brake Shoe* case be vacated, and that the Court appoint "independent receivers" of the Interborough and Manhattan, and that an accounting between those companies be had. The bill of complaint of the intervener, Lillian Boehm, also sets forth, without substantial variation from the allegations of the bill of complaint in the *American Brake Shoe* suit, the various obligations of the Interborough, which it alleges the Interborough "is and will be without financial resources to meet" (R. 87-94); that, "unless some definite action is taken on behalf of all the creditors so that the operations of said railroads may be continued, great and severe loss and irreparable injury will be inflicted upon

* Italics in this brief are supplied, unless otherwise indicated.

all creditors; that the credit of the defendant Interborough has been seriously impaired; and that it has no reasonable hope of finding assistance from any quarter" (R. 95). Accordingly, it joins with the Johnson bill in alleging the "imperative need" for the appointment of receivers of the Interborough Company (R. 97, 104), and asks for the appointment of "independent" receivers.

In short, neither the Johnson nor the Boehm bill challenged the truth or sufficiency of the bill of complaint, the propriety of the answer, or the jurisdiction of the District Court in the *American Brake Shoe* suit, but alleged, in substance, that the orders of Judge Manton therein were *coram non judice* and wholly void, asked that such orders be vacated and, upon affirmative allegations showing the necessity therefor, prayed for the appointment of new and independent receivers (R. 13, 80).

The question involved is, therefore, as to whether or not, in a case indisputably within the jurisdiction of the District Court for the Southern District of New York, and involving the necessity for the appointment of receivers, an order appointing such receivers is void because, as contended by the petitioners, Senior Circuit Judge Manton was deprived of all jurisdiction to make any order appointing receivers by reason of rules of procedure adopted by the eight Judges of the District Court.

Summary of the Argument.

FIRST: Any District Judge has inherent power under Section 13 of Title 28 of the United States Code and the Rules of Practice for the Courts of Equity promulgated by this Court to make at chambers an interlocutory order appointing a receiver *pendente lite*.

SECOND: The right to exercise the inherent power and jurisdiction of a District Judge to make an interlocutory order appointing receivers, vested in Senior Circuit Judge Manton while serving under a designation to hold a District Court, was not abrogated or restricted by Rules 1-a and/or 11-a adopted by eight Judges of the District Court for the Southern District of New York.

1. Under express authorization of the statute, Judge Manton became vested with all of the powers and duties of a Judge of the District Court for the Southern District of New York.

2. Rules 1-a and 11-a have not as yet received the concurrence of any of the Circuit Judges of the Second Circuit.

3. Rules 1-a and 11-a of the District Court, even assuming that they were adopted in the manner authorized by this Court, under Equity Rule 79, or that they are otherwise valid as general rules of procedure in the District Court, cannot deprive District Judges, or Circuit Judges serving as such, of inherent jurisdiction to grant interlocutory relief at chambers.

THIRD: Rules 1-a and 11-a, adopted by the Judges of the Southern District, in so far as they may be given any validity whatever, must be construed as being merely directory or procedural in character, which the parties had the right to waive, and Circuit Judge Manton, as Acting District Judge, the discretionary power to suspend, in the *American Brake Shoe* suit.

The rule in the Courts of the State of New York.

FOURTH: The *American Brake Shoe* suit presented unquestioned grounds for a receivership in equity and was

brought in the utmost good faith to conserve the assets of a large public service corporation for the benefit of all interested parties.

FIFTH: The order of Senior Circuit Judge Manton, designating himself to hold a District Court, is not open to review.

The duty to perform the judicial functions prescribed in the order of designation was made mandatory by Section 23.

The order of division of business.

CONCLUSION: The decision and decree of the Circuit Court of Appeals, reversing the decrees of the District Court, should be affirmed.

ARGUMENT

FIRST: Any District Judge has inherent power under Section 13 of Title 28 of the United States Code and the Rules of Practice for the Courts of Equity promulgated by this Court to make at chambers an interlocutory order appointing a receiver *pendente lite*.

That the appointment of receivers of the Interborough Company was necessary, that the corporation could not have done otherwise than admit the allegations of the bill of complaint in the *American Brake Shoe* case, and that there was no impropriety in appealing to a Federal District Court for the relief asked for, if not conceded, is certainly not disputed by the petitioners. In fact, the petitioners have brought an action in the same Court for similar relief. The general character of the *American Brake Shoe* suit, the sufficiency of the allegations of the

bill of complaint, and the propriety of the answer admitting the same, are, therefore, not questioned by the petitioners. Their criticism, and the ground upon which the petitioner Johnson asks this Court to reverse the decision of the Court of Appeals, is that counsel for the parties in the *American Brake Shoe* case, having a proper case within the jurisdiction of the District Court, applied for the appointment of receivers to a Judge who was without any power or jurisdiction whatever to grant the application. Such has been also the chief contention of the intervening petitioner, Boehm, until the filing of her brief upon the present argument, wherein she appears to largely abandon the contention (made as late as her brief in reply filed upon her application for the writ of certiorari herein, p. 8) that "Judge Manton's assumption of jurisdiction and appointment of receivers were *coram non judice*," and appeal to the broad, supervisory power of this Court to correct an alleged "improper exercise of discretion" by Judge Manton. Counsel presenting this brief feels justified in characterizing these contentions as extraordinary, because of what is believed to be the generally accepted view, supported by long established practice, followed particularly in the case of railroad receiverships, where continuity of operation is essential in the public interest, that applications for the appointment of temporary receivers may be entertained at chambers by any Judge of the District. The soundness of this practice is based upon the inherent chamber powers which have long been conferred upon all District Judges by the Federal Statutes and the Equity Rules promulgated by this Court.

Section 13 of Title 28 of the United States Code* provides:

> "The district courts, * * * as courts of equity, shall be deemed always open for the purpose * * * of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.
>
> Any district judge may * * * make * * * at chambers * * * all such * * * orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

This Court is authorized by Congress in Section 730 of the United States Code (Rev. Stat. 917) "generally to regulate the whole practice, to be used, in suits in equity * * * by the district courts." Pursuant to such authority, this Court has promulgated "Rules of Practice for the Courts of Equity of the United States," commonly referred to as the Equity Rules (226 U. S. 629).

Equity Rule 1 renders the above Section 13 of Title 28 of the United States Code specially applicable to courts of equity, the Code provision applying to both courts of equity and admiralty. Rule 1 repeats that "any district judge may * * * make * * * at chambers * * * all such * * * orders," etc. ("such" meaning interlocutory orders made pending the hearing of the causes).

Equity Rule 6 prescribed by this Court provides that:

> "Each district court shall establish regular times and places * * * when motions requiring notice

* Citations of provisions of the Code herein have reference to Title 28 of the United States Code, unless otherwise indicated.

> and hearing may be made and disposed of; but the judge may at any time and place * * * make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes. * * *"

It is assumed that there is no question that the order of Judge Manton, sitting as a District Judge, was an "interlocutory order." That point was decided by a learned Justice of this Court, Hon. Horace H. Lurton, while serving as Circuit Judge, in the receivership case of the Pere Marquette Railroad (*Horn* v. *Pere Marquette R. Co.,* 151 Fed. 626, 637), where a receiver was appointed at chambers upon consent of the railroad company. Judge Lurton said in his opinion that *"an application for a receiver* PENDENTE LITE *is plainly within any reasonable interpretation of the third rule in equity."* That case was decided in 1907, when the third rule in equity (quoted 151 Fed., p. 636) was practically identical with the second paragraph of Rule 1 above referred to.

The power to grant substantially all forms of interlocutory relief in equity, short of actual trial of causes on the merits, at chambers, has inhered in the Judges of the District Court and also the Judges of the Circuit Court until abolished in 1911, since the creation of those Courts, and the exercise of such jurisdiction has always constituted an important part of their work. The power was derived originally from the English Chancery practice, but the substance of Section 13 of the present Code was derived from the Act of Congress, August 23, 1842, Chapter 188, Section 5, 5 Stat. 517, and appeared in Sections 574 and 638 of the Revised Statutes of 1878, defining, respectively, the power of the District Court in admiralty and equity and the power of the Circuit Court

in equity to grant interlocutory orders. In the year 1842 also, this Court adopted revised Equity Rules of Practice, Rules 1 and 3 of which conferred upon any judges of the Circuit Courts, as courts of equity, power to grant interlocutory orders at chambers, which was substantially declaratory of the statute. The Judicial Code of March 3, 1911, abolished the Circuit Courts, and devolved upon the District Courts the jurisdiction in equity formerly possessed by the Circuit Courts. The substance of the foregoing provisions of the Revised Statutes was carried into Section 9 of the Judicial Code, which has been reenacted as Section 13, Title 28 of the United States Code. At about the time of the adoption of the Judicial Code and on November 4, 1912, this Court adopted revised Equity Rules, effective February 1, 1913, which, with subsequent amendments not material here, are in force to-day. Equity Rule 1 as adopted in 1912 was, in substance, a consolidation of the former Rules 1 and 3, and has not since been changed. It is declaratory of the statute with respect to jurisdiction in equity. It is significant that although the judicial sections of the former Revised Statutes and the former Equity Rules were subjected to radical revision in various respects, at the time of the adoption of the Judicial Code of 1911 and the present Equity Rules in the following year, no substantial change was made in the powers of District Judges, as successors to the Circuit Judges, to grant interlocutory relief in equity at chambers. In addition thereto, this Court adopted a *new* Rule 6, above quoted.

Perhaps note should be made here that the former Rule 3 did not contain the clause "whenever the same are not grantable of course, according to the rules and practice of the court." When the substance of the former Rule 3,

with some revision of language, was incorporated in the second sentence of the present Rule 1, at the time of the adoption of the new Equity Rules in 1912, the clause "whenever the same are not grantable of course, according to the rules and practice of the court" was added, similar language appearing in the statute (28 U. S. C. A., Title 28, Sec. 13; Judicial Code, Sec. 9). It is apparent that the phrase "according to the rules and practice of the court" has reference exclusively to motions "grantable of course," which are referred to in Equity Rule 2 and defined by Equity Rule 5, providing that certain motions and applications therein enumerated (which it is unnecessary to consider here) not requiring any allowance or order of the Court or of a Judge "shall be deemed motions and applications grantable of course by the clerk." The foregoing rule was derived from Rule 5 of the former Equity Rules, and it has constituted, for many years, a definition of "motions grantable of course" by the clerk. The comma appearing after the word "course" in Section 13 and Rule 1 may be disregarded in order to give effect to the obvious meaning of the statute and rule, as was done in the case of a statute in *Hammock* v. *Loan & Trust Co.*, (1881) 105 U. S. 77, where this Court said (at p. 84):

> "While the comma after the word 'motions,' if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute [citing authorities]. In the last case it was said: 'But for the punctuation, as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real

> meaning and intention of the law-makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'"

This Court said in *Ex parte Hollon Parker,* (1889) 131 U. S. 221 (at p. 225), that the chambers of a District Judge are "where he can conveniently attend to business relating to cases in his district." The effect of Section 13, Title 28 of the Code and Equity Rule 1, quoted above, as stated by the Circuit Court of Appeals for the Fourth Circuit in *Re American Home Furnishers' Corporation,* (1924) 296 Fed. 605, cert. granted 265 U. S. 578, and dismissed 266 U. S. 640, is that a Judge of a District Court of the United States "has at chambers the authority and power to make all interlocutory orders and to do everything that is necessary to speed the cause and promote justice to the parties, except the actual trial on the merits." And in *Horn* v. *Pere Marquette R. Co.,* Judge Lurton, referring to the appointment of receivers of a railroad corporation *pendente lite,* upon consent, stated (151 Fed., at p. 637):

> "The practice in the matter has, to my knowledge, never been questioned in this circuit. Why such a motion may not be entertained at chambers, in view of the conceded chamber powers of an equity judge in matters just as important, does not occur to me."

It was with reference to this matter that this Court, in the case of *Abbott* v. *Brown,* 241 U. S. 606 (1916), commenting upon Section 13 of Title 28 of the United States Code, stated (at p. 611):

> "The statutory provisions referred to are designed to render the District Courts readily accessible to applicants for justice in all branches of the jurisdiction."

And in *United States* v. *Finnell,* 185 U. S. 236, the Court, referring to the same statutory provisions as contained in Sections 574 and 638 of the Revised Statutes, said (at p. 243):

> "As will be seen from those sections, the District and Circuit Courts of the United States are always open for the transaction of certain kinds of business which, we think, may be transacted under the orders of the judge, who may at the time be absent from the place, room or building in which the court is held."

With respect to the inherent powers or jurisdiction of a District Judge, there appears to be little or no distinction between a District Judge and a District Court. As early as 1819, Chief Justice Marshall, sitting as a Circuit Justice in the Circuit Court for the Virginia District, in the case of *United States* v. *The Little Charles,* Fed. Cases No. 15613, declared:

> "By law the District Judge alone composes the court. He is a court wherever and whenever he pleases."

Judge Lurton also declared, nearly a hundred years later, in the case of *Horn* v. *Pere Marquette R. Co., supra* (at p. 636), referring to his interlocutory order, made at chambers, appointing a receiver of the property of a railroad company:

> "It must be borne in mind that the authority of the judge at chambers, and I speak altogether of a judge exercising equity powers, and not a common-law judge, or a judge administering law, as distinguished from equity, is that of the Court itself."

And in *Walters* v. *Anglo-American Mortgage & Trust Co.*, 50 Fed. 316, it was said, with reference to the Circuit Courts of the United States (at p. 317):

> "The authority of a judge at chambers is the authority of the court itself. Tindal, C. J., in *Doe dem. Prescott* v. *Roe*, 9 Bing. 104. The practice and the jurisdiction of the judge at chambers in chancery suits is in many instances so intimately blended and incorporated with the practice and jurisdiction of the court that it is sometimes difficult to separate one from the other."

The foregoing generally accepted view of Chief Justice Marshall and other Judges of the Federal Courts has prevailed in the Second Judicial Circuit, where, quite recently, the United States Circuit Court of Appeals declared, in the case of *Ackerson* v. *United States*, 15 Fed. (2d) 268 (1926), that "any acting judge constitutes a District Court." In that case, where a statute provided that an application for suspension of execution of sentence should be made to the "Court," it was held that there was nothing to prevent the applicant "from selecting some particular judge before whom to prefer his appeal for mercy, and nothing positive to prevent him from making the round of all the judges who may hold the court of original jurisdiction in which he was convicted."

In the matter here under consideration, therefore, there can be no doubt as to the right to apply to *any* District

Judge for the appointment of a receiver *pendente lite,* for both the statute (U. S. Code, Title 28, Sec. 13) and Equity Rule 1 specifically provide that the application for interlocutory relief may be made to "*any* District Judge," and it follows that such an order is made under authority conferred by an Act of Congress and is exercised pursuant to the equity rules governing practice in the District Courts, and established by this Court.

SECOND: The right to exercise the inherent power and jurisdiction of a District Judge to make an interlocutory order appointing receivers, vested in Senior Circuit Judge Manton while serving under a designation to hold a District Court, was not abrogated or restricted by Rules 1-a or 11-a, adopted by eight Judges of the District Court for the Southern District of New York.

The petitioners argue at some length that the order of Senior Circuit Judge Manton, designating himself to hold a District Court, under the circumstances disclosed in this case, was unauthorized and void. That contention will be considered briefly herein under a subsequent point. The present discussion assumes the validity of such designation.

1. Under express authorization of the statute, Judge Manton became vested with all of the powers and duties of a Judge of the District Court for the Southern District of New York.

There can be no question that, with certain immaterial exceptions, a Circuit Judge, designated to hold a District Court under Section 22 of Title 28 of the United States Code (Judicial Code, Sec. 18), has the right to exercise all the inherent powers of any Judge of the Southern District of New York. Section 22 provides:

> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties of a judge of the district * * * * to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)."

Section 23 of Title 28 of the Code (Judicial Code, Sec. 19) provides:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

It is significant that Section 22 of Title 28 of the United States Code confers power upon the designated Circuit Judge "to hold a *District Court*," thus investing him with all the powers incidental to the Court itself, including the power to control its procedure as far as essential to the performance of the purpose of his designation.

It is contended by the petitioners, however, that Judge Manton was nevertheless deprived of all jurisdiction to make any order in the *American Brake Shoe* case by virtue of Rules 1-a and 11-a, adopted June 30, 1932, effective the following day, by the eight District Judges. The holding of District Judge Woolsey, at the Motion Term, in vacat-

ing all decrees of Judge Manton in the *American Brake Shoe* case, was that the District Judge assigned to hold the Motion Part "was the *only Judge* of this Court who had the power or right to entertain the application for the receivership here in question at the time when it was made" (R. 718; *Johnson* v. *Manhattan Ry. Co.*, 1 F. Supp., at p. 819), and such seems to be the present theory of the petitioners herein, although their original bills of complaint in the Johnson suit allege that there were "other District Judges" who were able to entertain applications for equity receivership (R. 17, 99). The futility of this theory cannot be doubted, for two reasons:

2. Rules 1-a and 11-a have not as yet received the concurrence of any of the Circuit Judges for the Second Circuit.

It is assumed to be unnecessary, upon this application, to determine, or question, the right of the Judges of the Southern District to make regulations of practice with respect to the hearing of applications for the appointment of equity receivers or other motions, the observance of which may be insisted upon by the Judges entering into the arrangement. But that the rules here under consideration did not, as contended by the petitioners, deprive Senior Circuit Judge Manton, while serving under a designation to hold a District Court, of all judicial power or jurisdiction to appoint equity receivers in the *American Brake Shoe* case is clear.

The regulation of equity practice in the District Courts has been vested by Congress in this Court by Section 730 of Title 28 of the United States Code. The Congress has also expressly subjected the District Courts to this Court in making rules of practice in equity cases in the District Courts. The District Courts may make rules "not incon-

sistent with any law of the United States or with any rule prescribed by the Supreme Court under Section 730" (Sec. 731). It was specifically stated by District Judge Woolsey, who participated in making them, that General Rules 1-a and 11-a were promulgated under the power vested in the District Courts by Section 731 (R. 713; *Johnson* v. *Manhattan Ry. Co.*, 1 F. Supp., at p. 817). The only authority which this Court has given to the District Judges to make any rules governing practice in equity cases is contained in Equity Rule 79, entitled "Additional Rules by the District Court," and providing:

> "*With the concurrence of a majority of the circuit judges for the circuit,* the district courts may make any other and further rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same."

"Concurrence" imports joint action, and not merely approval. "By the use of the term, something more than a mere acquiescence or silent submission is implied" (12 *C. J.* 393). When used with reference to judges of a court, the term ordinarily signifies co-ordinate powers and, obviously, this Court in requiring the "concurrence" of the Circuit Judges, or a majority of them, contemplated *joint action* on the part of the District Judges and Circuit Judges in the adoption of any rules affecting procedure in equity cases, in recognition of the powers of District Judges vested in the Circuit Judges by law, and their right and duty, upon designation, to hold a District Court.

The attempted addition of Rules 1-a and 11-a to the Rules of the District Court by the eight Judges of the Southern District, purporting to become effective July 1,

1932, did not have the concurrence of a majority of the Circuit Judges for the Circuit, as is conceded in the opinion delivered at the motion term herein by District Judge Woolsey, who was one of the Judges participating in the adoption of the rules (R. 714).

That Rule 11-a is an equity rule seems clear, although District Judge Woolsey expressed a contrary view (R. 714; *1 F. Supp. 817*). It applies expressly to "applications for the appointment of receivers in equity causes," and even the petitioner herein refers to the rules as "rules governing equity receiverships in this district" (Johnson petition, p. 3).

3. Rules 1-a and 11-a of the District Court, even assuming that they were adopted in the manner authorized by this Court, under Equity Rule 79, or that they are otherwise valid as general rules of procedure in the District Court, cannot deprive District Judges, or Circuit Judges serving as such, of inherent jurisdiction to grant interlocutory relief at chambers.

This Court has said that "no rule of court can enlarge or restrict jurisdiction" (*Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635), and that it cannot itself, "by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other Courts of the United States or of a Justice or Judge of either, under the constitution and laws of the United States" (*Hudson* v. *Parker*, 156 U. S. 277, 284). What cannot be done by this Court, obviously cannot be done by inferior Courts.

No rule adopted by the Judges of the Southern District, therefore, could deprive the District Judges of their long established power to grant applications for the appointment of receivers and other forms of interlocutory relief at chambers, expressly secured by Section 13 of Title 28

of the Code and Equity Rule 1. Furthermore, under Section 731, any rule adopted by the District Court must not be inconsistent with "any rule prescribed by the Supreme Court under Section 730." Equity Rule 6 authorizes each District Court to establish motion days and motion parts of the Court. That rule provides the authority under which the District Courts may make administrative rules for the hearing of litigated motions. Equity Rule 6 could not, and does not purport to, confer upon the District Courts any power to limit the jurisdiction over interlocutory matters to be exercised by the District Judges at chambers. On the contrary, it contains an express reservation which preserves the power of the District Judges to make at chambers all interlocutory orders affecting the advancement, conduct and hearing of causes where the application therefor is made without notice or upon such notice as the Judge prescribes. The interpretation of Rule 6 by the intervening petitioner, Boehm (Brief, p. 44), that it "deals obviously with *District Courts* and not the powers of particular *Judges*," and that it requires that "*each* District Judge shall have regular motion days, but that at the same time each District Court shall not be barred from having *some* Judge available at other times and places for the determination of the matters mentioned," is contrary to the language and plain intent of the rule, which deals with both District Courts and the powers of the Judges thereof to grant interlocutory relief—not the power of "*some*" of the Judges.

Rule 1-a is also in conflict with Section 22 of Title 28 of the Code, which expressly states the exceptions with respect to the right of a designated Circuit Judge to exercise the powers and duties of a District Judge, namely, "the power of appointment to a statutory position or of permanent designation of newspaper or depository of

funds." The exceptions specified only render more evident the legislative intent to confer *all* other powers of a District Judge upon the designee. But Rules 1-a and 11-a impose further exceptions, and, therefore, constitute legislation affecting jurisdiction and not practice. The exceptions which Rules 1-a and 11-a attempt to impose have precisely the same effect as if the exceptions stated in Section 22 were made to read, "(excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds, to entertain applications for equity receiverships or to do any work whatever other than that assigned to him by the Senior District Judge)."

Section 23 renders mandatory, as has been noted, the performance of the designated duties.

Ex parte United States, 226 U. S. 420, 423.

In another aspect, it is obvious that Rule 1-a is in direct conflict with cognate provisions of the Code. Section 24, in connection with Section 17, authorizes the Senior Circuit Judge, or, in his absence, the Circuit Justice, in the event of it appearing that a Judge of any District Court has an interest or relationship in a pending suit which renders it improper for such District Judge to sit on the trial, to designate and assign a District Judge of any District Court within the same Circuit to discharge the duties of such other District Judge so disqualified. Section 25 provides for a similar procedure, in the event of the filing of an affidavit of personal bias or prejudice on the part of the Judge before whom an action or proceeding is to be tried or heard. In the situations arising under Sections 24 and 25, it is entirely clear that the law requires the interested party to make application to the *Senior Circuit Judge* for the designation of another Judge to hear

the particular case. But, under new Rule 1-a of the District Court for the Southern District, as interpreted by the petitioners herein, no such designated Judge could proceed to hear the case unless assigned thereto by the Senior District Judge, which obviously renders the rule clearly inconsistent with the purpose of the law.

Rules 1-a and 11-a, if given the force for which appellants contend, are jurisdictional in effect, destroy judicial powers and inhibit the exercise of duties conferred and made mandatory by express statutory provisions.

THIRD: Rules 1-a and 11-a adopted by the Judges of the Southern District, in so far as they may be given any validity whatever, must be construed as being merely directory or procedural in character, which the parties had the right to waive, and Circuit Judge Manton, as Acting District Judge, the discretionary power to suspend, in the *American Brake Shoe* suit.

That Rule 11-a is a mere procedural or directory rule or regulation of practice seems indisputable. The nature of the rule makes it so, notwithstanding the somewhat mandatory language in which it is phrased. In fact, District Judge Woolsey, in his opinion rendered at the motion term, said that it "merely tells where attorneys have to go to get a receiver appointed. * * * It simply points to the door of the room where applications for receiverships must be made" (R. 714). Upon the argument, he described it as a "calendar" rule (R. 876). As this Court said in *Abbott* v. *Brown* (241 U. S., at p. 609), a rule or requirement of such a nature was "a mere regulation of practice, and a breach of it would be, at the utmost, a mere error of procedure, not affecting the jurisdiction." This Court has held that many procedural rights may

be waived by the parties, not only when such rights are regulated by rule, but when they are conferred by express provision of the Federal statutes. Thus, in a suit for the appointment of a receiver, this Court held that where neither the plaintiff nor the defendant were residents of the district in which a suit was brought, the exemption from being sued out of the district of its domicile was a privilege which was waived by the defendant appearing and consenting (*Central Trust Co.* v. *McGeorge*, 151 U. S. 129); and this Court further held in that case that the waiver was also binding upon stockholders and creditors who petitioned the Court to have the order appointing receivers set aside on the ground of fraud and lack of jurisdiction. In *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127, this Court said (at p. 130) that a general appearance to the merits, if the case was one of which the Court could take jurisdiction, "waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought." There has been no rescission from the foregoing rule in later decisions of this Court. Thus in the case of *Panama R. R. Co.* v. *Johnson* (1924), 264 U. S. 375, an action was brought in the District Court of the United States for the Eastern District of New York by a seaman against his employer under Section 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, and it was held by this Court that the District Court for the Eastern District of New York had jurisdiction to try the case, it being within the general jurisdiction conferred on the District Courts by Section 24 of the Judicial Code, and that the special statute under which the action was brought, although its language purported to define "jurisdiction," related in fact only to venue and conferred a personal privilege which was

waived by the general appearance of the defendant. Mr. Justice Van Devanter, delivering the opinion of this Court in that case, said (at p. 385):

> "By a long line of decisions, recently reaffirmed, it is settled that such a provision merely confers on the defendant a personal privilege which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege."

Likewise, as objections to the particular Court which may entertain a proceeding, within its general jurisdiction, may be waived by the parties, so failure to observe regulations as to the particular Judge who may hear a case within the jurisdiction of the Court, constitutes nothing more serious than an irregularity which may be waived by the parties with the acquiescence of the Judge. An example is presented in the early case of *Doggett* v. *Emerson*, 7 Fed. Cas. 819 (Case No. 3,961, 1845), where it was held by Justice Woodbury of this Court, sitting as a Circuit Justice in a Circuit Court held in and for the Maine District, that the validity of a decree rendered by the Presiding Judge of the Circuit Court in a case in equity could not be attacked on the ground that the case was heard and decided in vacation, where the hearing was held in vacation by agreement of the parties. In that case Mr. Justice Woodbury said (at p. 819):

> "It cannot impair the validity of the opinion and decree, that the hearing was had and they were made in the vacation. Because such is often the practice for the convenience of the parties themselves; and when assented to, as in this case, by

> them, and attended on by them, no court of law, much less of equity, could permit either of them on that account to impeach their validity. *Gould* v. *Oliver,* 2 Scott N. R. 241."

A broad rule as to the power of a Federal Court, with the consent of the parties, to waive all preliminary requirements, and entertain a case which is within the lawful power of the Court to hear and determine, was stated in *Toledo, St. L. & W. R. Co.* v. *Perenchio,* 205 Fed. 472 (1913), where various personal rights, including the issuance of a summons, were waived. In that case the Court of Appeals for the Seventh Circuit said (at p. 476):

> "Within its limitations respecting subject-matter, a federal court is a court of general jurisdiction. *If organic power to hear the controversy exists, it is immaterial when or how the parties get into court; it is enough if they do come in and waive all preliminaries to the submission of their controversy.*"

The Rule in the Courts of the State of New York.

Rules creating divisions or parts of the Court which may entertain motions of various classes have been in force for many years in the Supreme Court in various districts of the State of New York, particularly in the County of New York. Counsel submitting this brief feels that, in the absence of interpretative decisions in the Courts of the United States, he was warranted in assuming that Rules 1-a and 11-a, adopted by the Judges of the Southern District, could have, and were intended to have, no greater effect upon the jurisdiction of the Judges of the Court than corresponding rules regulating practice in

the State Supreme Court as interpreted by the highest Court of the State. It is also assumed that, in recognition of the general policy embodied in the Conformity Act (28 U. S. C. A., Sec. 724, formerly Rev. Stat. 914), this Court will be disposed to pay deference to these decisions interpreting regulations of practice closely analogous to the rules of the District Court here under consideration, even though such decisions may not have the force of binding or controlling precedents. As this Court said in *Barrett* v. *Virginia Ry. Co.* (1919), 250 U. S. 473 (at p. 475), quoting its earlier decision in *Nudd* v. *Burrows* (1875), 91 U. S. 426, 441, "the purpose of the provision [Rev. Stats. 914] is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State Courts of the same locality."

The Constitution of the State of New York provides that the Justices designated to serve on the Appellate Division in each Department "shall have power to fix the times and places for holding Special Terms therein, and to assign the Justices in the Departments to hold such terms; or to make rules therefor" (Art. VI, Sec. 2). Pursuant to such authority the Appellate Division of the First Department, embracing New York County, has provided by rules for "Parts" of Special Terms, one for the hearing of "litigated motions," another "for *ex parte* business," and six others "for trials and for the hearing and decision of all other Special Term matters not otherwise provided for in these rules." The Appellate Divisions in the four Judicial Departments of the State have also provided by rule for the holding of Special Terms in the various other counties of the State, and in certain sections, for Special Terms, or Parts thereof, to entertain particular business, such as the hearing of "motions," "contested motions,"

"non-enumerated motions," "all *ex parte* applications," etc. These rules for the hearing of particular classes of motions before certain Parts in certain counties of the State of New York are of long standing and date back virtually to the enactment of Chapter 448 of the Laws of 1876, adopting the "Code of Remedial Justice," commonly known as the Code of Civil Procedure.

It is settled practice in the Courts of the State of New York that rules or regulations of the nature above indicated imposed by a statute or the Courts and prescribing the particular place, Judge, division or part of the Court where a motion or application may be made, do not deprive another Judge or Justice of the same Court of power to entertain the application and grant any appropriate relief within the jurisdiction of the Court.

> *People ex rel. The Mayor* v. *Nichols*, 79 N. Y. 582 (1880);
> *Matter of Petition of Argus Co.*, 138 N. Y. 557 (1893).

The matter was thoroughly litigated and considered in the two cases cited. The Court of Appeals said in the *Nichols* case that "any such regulation must be subject to the control of the justice" and that "otherwise the power of the judge would be limited, public interest sometimes put in jeopardy and the rights of citizens infringed."

For many years it was prescribed by New York statute that "a motion, upon notice, in an action in the Supreme Court, must be made within the judicial district, in which the action is triable, or in a county adjoining that in which it is triable" (Code of Civil Procedure, Sec. 769). The provision is now contained in Rule 63 of the Rules of Civil Practice. It is held, nevertheless, that parties may agree to the hearing of a contested motion before a Justice

holding a Special Term in any part of the State, the failure to observe the statutory regulation being held to be an "irregularity" only, not affecting the general jurisdiction of the Court over such motions. The foregoing rule was laid down many years ago in *Rice* v. *Ehle*, 65 Barb. 185 Supreme Court (Fourth Department, General Term, 1873; reversed on other grounds, 55 N. Y. 518). In that case a motion in an action in the Supreme Court pending in Herkimer County was, by agreement of counsel, heard at a Special Term in Saratoga County, which did not adjoin Herkimer County.

In *Matter of Wadley*, 29 Hun 12, the General Term of the Supreme Court for the Fourth Department held that upon consent of the parties, a Justice of the Supreme Court sitting in chambers had power to entertain a contested motion, although he was holding a Special Term under an order limiting it to "*ex parte* business only," the Court saying that the limitation "was for the judge's convenience only. If he saw fit to hear litigated motions brought on by consent, he could do so."

So, in *Peo.* v. *Anglo-American Savings &c. Association*, 115 App. Div. 692, the Supreme Court at Special Term in Albany County was held to have jurisdiction to entertain a motion for the passing of the accounts of a receiver in an action pending in Kings County, though contrary to the requirement of Section 769 of the Code of Civil Procedure, the making of the motion in the wrong county having been waived by the parties. In that case, the Appellate Division of the Supreme Court said (at p. 693):

> "The Supreme Court had jurisdiction; the question of the county in which the motion should be made was one of regularity only."

The general rule was stated by the Court of Appeals in *Cole* v. *Gourlay* (1880), 79 N. Y. 527, that a rule of the Court is "a mere regulation as to the practice which the Court has the power to waive, and does not affect the jurisdiction of the Court where there has been a substantial compliance with the law. * * * A mere departure from a rule of the Court does not impair the validity of the proceedings." Quite recently also, in *Matter of Benedict* (1925), 239 N. Y. 440, where a disregard of one of the Rules of Civil Practice adopted by the judiciary and the bar, pursuant to statutory authority, was held not to affect the validity of an order made in a proceeding over which the Court had jurisdiction of the subject-matter and the persons, the Court of Appeals said (at p. 445): "Failure to follow the procedure laid down by a mere court rule does not deprive the court of jurisdiction." The rule so stated is therefore of long standing in New York practice and was applied with reference to the former General Rules of Practice, which were required to be adopted by the Judges of the Supreme Court pursuant to the Code of Civil Procedure (Sec. 17), though the Code further provided that the rules should be "binding upon all the courts in this state and all the judges and justices thereof" (except the Court of Appeals and the Court for the Trial of Impeachments), and the Rules, being made under special statutory authority, were held to have the force and effect of statutes (*Matter of Moore*, 108 N. Y. 280).

We have taken the liberty of citing these numerous decisions of the Court of Appeals and lower New York Courts that it may be observed readily how well settled the New York rule is that every Justice of the Supreme Court has general Special Term powers, and neither statu-

tory provisions requiring certain motions to be made in certain counties, nor rules designating certain Special Terms, or parts thereof, to entertain specially enumerated classes of motions promulgated under the above mentioned constitutional (formerly statutory) authority can deprive a Justice holding such Special Term of jurisdiction to entertain and adjudicate other kinds of Special Term business; and the exercise of such power has been sustained in many instances.

Counsel submitting this brief insists that the rules relied on by the petitioner herein did not deprive Judge Manton of jurisdiction to grant the application for the appointment of receivers in the *American Brake Shoe* case; but, in addition thereto, counsel desires to point out that, in joining with the counsel for the complainant in making the application to Judge Manton, he followed long-established practice, and that no disrespect for any of the Judges of the Southern District was intended. Counsel chose what was believed to be the best course to insure an orderly and just administration of a receivership involving a public service corporation and large financial interests, and in appealing to the Senior Circuit Judge, counsel was exercising a privilege which seems to have been expressly contemplated by Congress in authorizing the designation of Circuit Judges to hold a District Court. It appears that, when the enactment of the Judicial Code was pending in Congress, as set forth in the Congressional Record, large equity receiverships, especially those relating to railroads, were the subject of somewhat extended discussion, and it was stated by Congressman Mann of Illinois, an influential member of the House of Representatives, that these large cases "were handled mostly in chambers"; and it was further pointed

out, in the course of the debate, in answer to doubts raised as to the advisability of the abolition of the jurisdiction of the Circuit Courts over such receiverships, which was brought about by the adoption of the Judicial Code, that, while the Circuit Courts, as such, would no longer exercise jurisdiction, provision had been made under the proposed Section 18 (now 22) of the Code, which would allow Circuit Judges to appoint and control receiverships under designation by the Chief Justice, Circuit Justice or Senior Circuit Judge (46 *Congressional Record*, Part I, pp. 89, 302-304).

Counsel respectfully insists that he acted well within the rights of the corporation which he was representing in assuming that Rules 1-a and 11-a, which were put in operation over night, could not, and were not intended to have the effect of suddenly rendering absolutely invalid and unlawful a recognized practice of many years' standing, namely, that of applying to any available Judge of the District Court at chambers, for the appointment of receivers in a proper case, upon consent of the parties, and the further practice of making application to the Senior Circuit Judge for a designation of a Circuit Judge to assume charge of an important proceeding.

FOURTH: The *American Brake Shoe* suit presented unquestioned grounds for a receivership in equity, and was brought in the utmost good faith to conserve the assets of a large public service corporation for the benefit of all interested parties.

The briefs filed by the petitioners herein contain broad assertions that the entire *American Brake Shoe* action is "collusive" (Johnson brief, pp. 2, 36; Boehm brief, p. 8).

The foundation of the petitioner Johnson's contention is said to be, however, that the *American Brake Shoe* case is "wholly void, because Judge Manton had no power to assure jurisdiction therein" (Johnson brief, p. 57). It appears, therefore, that notwithstanding broad assertions of the petitioners to the effect that the entire receivership proceedings are void, the real attack is, not upon the action itself, but upon the orders of Judge Manton made therein. The petitioner Johnson refers to various allegations of his petition and supplemental petitions in support of the charge now made in his brief that the *Brake Shoe* case is a collusive action, but it is entirely evident that the allegations of the petitions in the *Johnson* suit are directed toward quite a different matter, namely, the orders of Judge Manton in the *American Brake Shoe* suit, and the specific relief asked is that those orders be vacated and set aside, and new receivers be appointed. There is no prayer that the *Brake Shoe* action be adjudged collusive on any ground. On the contrary, the petitioners seek to perpetuate the *American Brake Shoe* action by means of the order consolidating it with their own suit (Johnson brief, p. 68) and contend that their general prayer is sufficient to entitle them to that relief (Johnson brief, p. 71). The charge of collusion seems intended, therefore, merely to create a prejudicial atmosphere, rather than to establish that the *American Brake Shoe* suit is collusive in any legal sense. Counsel submitting this brief deems it his duty, however, to point out briefly that in consenting to a receivership in the *American Brake Shoe* suit, his sole purpose was to secure the protection of a Federal court of equity to administer the affairs of a large public service corporation in the best interests of all of its creditors, with due regard to its public obligations.

It is claimed that the *American Brake Shoe* suit was "prearranged" (Johnson brief, p. 2). A consent receivership necessarily involves a degree of concert of action between the complainant and the defendant, but receiverships by consent have been judicially sanctioned for many years. More than twenty-five years ago a receivership proceeding was instituted in the United States Circuit Court for the Southern District of New York by simple contract creditors against the New York City Railway Company, a corporation providing practically all of the street surface railroad transportation in Manhattan and the Bronx and rendering what, at that time, was the most extensive local transportation service in the City of New York. The New York City Railway Company had become insolvent and counsel presenting the present brief, being at the time general attorney of the New York City Railway Company, filed in that case an answer admitting the allegations of the bill of complaint and joining in the request for the appointment of receivers, which, upon application to Circuit Judge E. Henry Lacombe, was granted. The receivership was later extended to the Metropolitan Street Railway Company and the case has since been known as the Metropolitan Railway Receivership. The procedure was thoroughly considered and fully approved by this Court (*Re Metropolitan Railway Receivership*, 208 U. S. 90, 110). The procedure of securing the appointment of equity receivers at the instance of a simple contract creditor and upon consent of the insolvent corporation, adopted in the case of the New York City Railway Company receivership, has been followed quite generally in later cases arising in the Second Circuit, and has quite recently been approved by the United States Circuit Court of Appeals for the Second Circuit in *Kingsport Press* v. *Brief English Systems*, 54 Fed. (2d) 497, 500 (1931).

We also call attention to the recent case of *Guaranty Trust Co. of N. Y.* v. *Fentress* (Oct., 1932), 61 F. (2d) 329, 332, where the Circuit Court of Appeals for the Seventh Circuit approved similar procedure in the case of equity receiverships for the Insull corporations of Chicago, individual receivers having been appointed by the District Court at the suit of a contract creditor upon the consent of the debtor. In the years 1918 and 1919, respectively, receivership proceedings were instituted by simple contract creditors against the Brooklyn Rapid Transit Company and the New York Railways Company, with the consent of the corporations, the procedure approved by this Court in the case of the Metropolitan receivership being substantially followed (see *American Brake Shoe & Foundry Co.* v. *New York Railways Co.*, 282 Fed. 523, 525; *Westinghouse Elec. & Mfg. Co.* v. *Brooklyn R. T. Co.*, 291 Fed. 836). This Court also appears to have reaffirmed its sanction of the appointment of receivers at the suit of a simple contract creditor, with the consent of the debtor, "where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good," in its recent decision, delivered by Mr. Justice Cardozo, in the case of *Shapiro* v. *Wilgus* (Dec., 1932), 287 U. S. 348, 356. In the instant case no contention is or can be made that the appointment of receivers by the United States District Court was an interference with the jurisdiction of the State Courts, or involved any fraudulent misrepresentations to the Court or any interested party, important elements entering into the decision in the case of *Harkin* v. *Brundage*, 276 U. S. 36.

That the parties to the *American Brake Shoe* suit agreed as to the particular forum in which the suit should be instituted is also a matter which is not open to criticism (*Blair* v. *City of Chicago*, 201 U. S. 400, 448; *Re Metro-*

politan Railway Receivership, 208 U. S. 90, 111). It certainly cannot be contended that the material averments of the bill of complaint in the *American Brake Shoe* case are not true, because they are substantially realleged in the bills filed by the petitioners (R. 13, 80). The contention of the petitioners that the defendant in the *American Brake Shoe* suit had a "special fund" out of which to pay the complainant (Johnson brief, p. 38; Boehm brief, p. 9), and that, therefore, the complainant did not occupy the position of an ordinary simple contract creditor, is without foundation. In support of their contention, petitioners refer to that portion of the decision of this Court in *Gilchrist* v *Interborough R. T. Co.,* 279 U. S. 159, pp. 196, 198, which quotes provisions of the contracts between the City of New York and the Interborough Company. These provisions relate merely to matters of accounting between the parties to the contracts, and neither create any special fund nor do they fix in any way the obligation of the Interborough Company to its ordinary creditors for supplies furnished.

It is further claimed by the petitioners (Johnson brief, pp. 38, 40; Boehm brief, p. 8) that the *American Brake Shoe* suit was brought to insure "friendly" receivers, and that one of its "chief objectives" was the disaffirmance of the Manhattan lease. That counsel submitting this brief earnestly hoped that the receivership would retain the aid of a management which has carried the corporation through many difficult years under the handicap of inadequate revenues is conceded. The abrogation of the Manhattan lease is entirely a matter for future judicial determination, as to which the petitioners will have an opportunity to be heard. It may be pointed out, however, that the question of collusion is not determined by the alleged motives or "objectives" of a receivership proceed-

ing. Such considerations were urged upon this Court in the case of *Dickerman* v. *Northern Trust Co.* (1900), 176 U. S. 181. In that case a mortgage had been given by the defendant to secure a large number of bonds and provided that the bonds should become payable if any execution should be sued against the property of the company, and such company should not forthwith pay the same. A bondholder brought suit before a justice of the peace upon six coupons, the defendant company consented to a judgment and to the issue of an execution, and, upon the same day, the trustees under the mortgage took possession of the property. Thereupon a bill in equity to foreclose the mortgage was filed by the trustees and a receiver was appointed upon consent. It was held that while the proceedings were instituted with the consent of the corporation for the obvious purpose of surrendering the property to the trustees and the receiver, the Court would not inquire into the motives of the parties, the debt being honestly due, and that the proceedings were not collusive in any legal sense. The Court said (at p. 190):

> "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. * * *
>
> The company was not bound to defend if there were no defence. The forms of law were complied with. It would doubtless have been more seemly if judgment had not been entered until the return day of the summons, if the execution had not issued until the expiration of the twenty days allowed by

law, and if the trustees had not been so alert in seizing upon the non-payment of the judgment as an excuse for declaring the principal and interest of the bonds to be due. But this haste did not render the judgment or execution void. If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of stockholders cannot question their right to do so."

The contention that the Interborough Company had cash for more than was necessary to pay the claim of the complainant in the *American Brake Shoe* case, and that the Interborough Company had not attempted to secure an extension of its notes, is without merit. At the time of the commencement of the suit, the maturity of more than $31,000,000 of the Seven Per Cent. Notes of the Interborough Company, due September 1, 1932, was imminent. Efforts to secure extensions of the notes would have opened the door to a multitude of actions, it having been held by the New York Courts that the individual noteholders could maintain actions and secure judgments upon their notes against the company (*General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794, aff'd 235 N. Y. 133). Such a state of affairs, beyond peradventure, would have precipitated a mad scramble of noteholders and other creditors for advantage, and certainly resulted ultimately in a receivership.

FIFTH: The order of Senior Circuit Judge Manton, designating himself to hold a District Court, is not open to review.

The petitioners argue at length that there was no "public interest" which authorized Senior Circuit Judge Manton to hold a District Court, and that, therefore, the order of designation was wholly unauthorized and void.

Judge Woolsey held that he could not vacate the order of designation for "want of jurisdiction." Neither the petitioner Johnson nor the petitioner Boehm appealed from that part of his order which denied their motion in that respect. The Circuit Court of Appeals therefore did not have the question before it.

In any event, however, the attack of the petitioners upon the order of designation is without merit. The Senior Circuit Judge followed an established practice in the Second Circuit in designating himself to hold a District Court. That the determination of "public interest" in analogous situations is final with the designating authority is the settled doctrine of the New York Court of Appeals, the highest Court of the State comprising the Southern District (*People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487). Likewise, in the case of *People* v. *Ballard*, 134 N. Y. 269, wherein a determination as to "public interests," requiring the bringing of certain actions, was held to be final with the Attorney General of the State, the Court of Appeals pointed out that, otherwise, the question of "public interests" would become an "issuable fact," and it was said (at p. 293):

> "Would not this lead to an intolerable multiplication of issues? Could those issues be defined by

pleadings? Unless so defined, could the defendants be prepared for trial?

We think that the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and that it cannot be made the subject of inquiry by the courts."

This Court pointed out in *Ex parte United States,* 226 U. S. 420, 424, referring to the sections of the Judicial Code authorizing the designation of Circuit Judges to hold District Courts, that the statute "clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law." Hence, the powers of a District Judge are vested in Circuit Judges *directly by the statute,* the order of designation being merely the medium whereby the exercise of such powers is brought into operation. That being so, it would seem that the jurisdiction of the designated Judge could not be affected by any irregularity with respect to the designating order, assuming that such irregularity existed.

A primary purpose of Section 22 was to conserve the traditional legislative policy of providing an opportunity for the members of appellate Federal courts to sit at *nisi prius.* This general purpose, as well as that of checking "the tendencies to give them (the lower courts) a local character," was expressed in the course of the debate preceding its enactment on behalf of the American Bar Association, a committee of which had drawn up the bill originally submitted in 1899 (46 *Congressional Record,* Part 2, p. 1542).

It was further stated by Mr. Brantley (46 *C. R.,* Part 3, p. 2147) that "the founders of this Government were wise in my judgment when they so framed our judicial

system that the great judges of the Supreme Court and that the great appellate judges of the Country would not be segregated and set apart and removed from all contact with the people. * * *" And he referred (p. 2148) to the statements of Senators Evarts and Morgan in the debate of 1890 to the same effect, in which the opinions of the members of the Supreme Court on the advantages of *nisi prius* work by the members of the higher courts were quoted.

At page 2155 Mr. Moon, of Pennsylvania, in charge of the bill, read a letter by Judges Taft, Lurton and Day stating that "we suggest the wisdom of a provision that shall enable the Circuit Court of Appeals * * * to designate and authorize one of its members to hold a district court in an emergency. * * * We feel sure that emergencies may arise rendering it most desirable that one of the Circuit Judges should be enabled to hold a district court in exceptional cases."

In the debate in Congress (46 *C. R.*, Part 1, p. 302), Mr. Parker also said:

> "From the beginning the courts of the United States have been on the English plan, where if it be an important case, the judge of the highest court went down in order to try the case before the people in the beginning";

and at page 333:

> "We want to preserve it and not to destroy it."

And on page 302, Mr. Moon approved a statement of Mr. Bartlett, of Georgia, that under Section 22 "a Circuit Judge can be required to go and preside in important cases."

Other references to the designation of Circuit Judges to try important cases were made (as at p. 303, 46 *C. R.*), where it was pointed out that "great equity cases are almost always heard before the circuit judges rather than by the district judge" and that it should be left to the judges of the highest Court "to determine for themselves * * * whether the cases are of sufficient importance."

The historic background and the legislative history of the statute, as well as its unequivocal language, forbid the possibility of a legislative intent that its broad remedial purposes should be impaired by local nullifying rules of practice. In *United States* v. *Gill*, 292 Fed. 136 (C. C. A. 4th, 1923), acting under Section 22, it was held:

> "The 'public interest' is involved in the dispatch of all the business of the courts. *These sections of the statute were intended to have a liberal and elastic rather than a strict and rigid construction, to facilitate the business of the courts.* The public interest is involved in all the conditions mentioned in sections 13, 14 and 20 (Secs. 17, 18 and 24, U. S. C.). Therefore we construe Section 18 of the Judicial Code (Sec. 22, U. S. C.) to authorize the Chief Justice, or circuit justice, or the senior circuit judge, to designate a circuit judge to hold the district court when any of the conditions mentioned in Sections 13, 14 and 20 *or any other conditions* arise which in his judgment so involve the public interest as to require the designation of another judge to hold any District Court." (Italics ours.)

A long-continued practical construction has been given to Section 22. Since the adoption of the Judicial Code in

the year 1911, Senior Circuit Judges of the Second Circuit, on various occasions, have designated themselves to hold a District Court in the Southern District of New York. Beginning with the year 1912, Senior Circuit Judge E. Henry Lacombe made several such designations, and like designations have been made by his successors, Senior Circuit Judges Henry G. Ward, Henry Wade Rogers, Charles M. Hough and Martin T. Manton (R. 553-554). In certain cases these designations have been general and in other cases they have provided for the hearing of specific cases (R. 655, 661). The same practice has been followed in other judicial circuits (R. 555-556, 662). Owing to congestion in the District Court for the Southern District of New York in recent years, many non-resident District Judges have also been designated to hold a District Court in that district, and the creation of additional judgships is now under consideration (R. 556, 558). Under date of March 20, 1930, Senior Circuit Judge Manton designated himself "to hold at any time a session or sessions of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex-parte and other business as may come before him" (R. 661). Judge Lacombe, who became Senior Circuit Judge of the Second Circuit at the time of the enactment of Section 22, twice designated himself to conduct a particular cause (R. 655, 657) (see *Penn. Steel Co.* v. *N. Y. City Ry.*, 221 Fed. 440 [S. D. N. Y., 1915]), and each of the Senior Circuit Judges of that circuit has since then designated himself.

The practice of Senior Circuit Judges to designate themselves to hold District Courts, and in their designation orders to prescribe the trial of particular cases, was fully established at the time Section 22 was re-enacted in 1922.

The designation upheld in *United States* v. *Gill, supra,* was to try a particular case.

The Duty to Perform the Judicial Functions Prescribed in the Order of Designation Was Made Mandatory by Section 23.

Section 23 provides: "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge *all the judicial duties for which he is so appointed,* and all the acts and proceedings in the courts held by him, or by or before him shall have the same effect and validity as if done by or before the District Judge of the said district."

As said by Mr. Moon, Chairman of the Judiciary Committee, 46 *C. R.,* p. 304, in answer to the suggestion that the "designation is rather a disagreeable function to perform." The designated judge "is compelled by the next section (23 U. S. C.) to discharge those duties."

A power conferred concurrently upon the Chief Justice, the Circuit Justices and the Senior Circuit Judges, to find the existence of a public interest cannot be subject to review. The power is one of supersession and should possess, above all, finality, for if a finding of the fact of public interest can be made subject to review, or if disabling rules of the lower court are permitted to impair or render uncertain the operation of the power, not only would delay result, but unnecessary occasions for conflict be induced by attempts to limit or prevent the exercise of the designated powers.

An attack upon the finding of public interest in the present case seems peculiarly unwarranted, for it is recognized by the petitioner Boehm (Brief, p. 33) that a "great public interest" was involved in this receivership.

Instances of designation under Section 22 in receivership cases have been very frequent in this district and the exceptional character of the instant receivership, in its relation to the public interest, would seem entirely evident. No grounds for the finding of public interest are stated in the order and the finality of the finding is not open to question; but, in view of the reliance placed by petitioners upon the contention that a designation made to insure the appointment of individual receivers in a receivership of this character would be wholly devoid of public interest, it may be noted that there are over $300,000,000 par value of the securities of the Interborough and Manhattan Companies in the hands of the public and listed upon the local exchange. These securities are unquestionably widely distributed among the stockholders, depositors and officers of local financial institutions, which, as receivers, would be subject to the embarrassment of the "innumerable possibilities of conflict" between conflicting interests, to which the Boehm brief (p. 36) refers.

That the public interest has been served is evidenced by the fact that notwithstanding such peculiar possibilities of conflict, there has been no claim from any source that the conduct of the receivers has been otherwise than impartial and efficient. Nor can there be any doubt as to the imminent necessity of the receivership as the subject of an order of designation directed to meet that emergency.

Rules 1-a and 11-a, if given the force for which petitioners contend, are jurisdictional in effect, destroy judicial powers and inhibit the exercise of duties conferred and made mandatory by express statutory provisions. No rule of court can restrict jurisdiction (*Washington-Southern Co.* v. *Baltimore Co., supra*).

The Order of Division of Business.

The power and duty of Judge Manton to perform the designated function of entertaining the application of the American Brake Shoe Company reposed upon his statutory designation of August 25th "to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company vs. Interborough R. T. Co." (R. 177). The grant of power under Section 22 was plenary, and Section 23 imposed an obligation "to discharge all the judicial duties for which he was so appointed."

Section 27, U. S. C., provides that:

> "In districts having more than one district judge the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

The provision requiring the Senior Circuit Judge to divide the business in case of disagreement is mandatory in form and the finding of the Senior Circuit Judge as to a failure of agreement is final (*Case* v. *United States,* 14 Fed. [2d] 510, 512).

The authorization to divide work by agreement is permissive and in that respect Section 27 is a mere general provision for the convenient distribution of business.

Section 22 is a specific grant of power to exercise designated functions. It deals specially with a particular subject, and, in accordance with recognized principles of

statutory construction, it, and not the general and permissive provisions of Section 27, controls the jurisdiction of a judge designated to perform specific duties.

Section 27 provides for the mere convenient division of business and is not concerned by whom, among the District Judges, it may be performed. But Sections 22 and 23 specifically provide for the selection of a judge of a higher court to perform work of the District Court which the designating justice or judge may deem, in the public interest, should be done by such designee and by no other judge.

Rule 11-a seeks to limit (in the instant case to destroy) the right to perform the designated work.

The special purpose and requirement expressed by Sections 22 and 23 must govern. Otherwise a specific legislative intent, remedial in character, would be nullified by a general and less specific provision.

> *Rogers* v. *United States*, 185 U. S. 83, 87, 89.
> *United States* v. *Mammoth Oil Co.*, 14 F. (2d) 705, 715.
> *Simon* v. *Simon*, 26 F. (2d) 530, 532.

Judge Manton being by Sections 22 and 23 specifically vested during his term of service under the order of designation with all the rights, duties and powers of a District Judge, became a District Judge to the extent of such coordinate and equal powers of his associate appointed District Judges as might be necessary to the discharge of his statutory duties. If and to the extent that the discharge of those duties is made dependent upon rules of division of business, which can possess validity only by concurrent and unanimous agreement by the Judges affected thereby, his right and duty in the performance of the functions of a

District Judge must therefore extend to the granting or withholding of assent to such rules. No rule of the appointed Judges can confine to themselves alone the discharge of the business of the Court, for that business must at all times be the subject of the superior and superseding disposition effected in the public interest by the power of designation reserved to Judges of the higher Courts by Section 22 and other statutory provisions.

In the presence of rules inhibiting the performance of designated duties and functions, a disagreement as to the division of business among the Judges necessarily exists and must, pursuant to the requirement of Section 27, be found to exist by the Senior Circuit Judge of the circuit in which the district lies. The duty is then imposed upon the Senior Circuit Judge to make, in the interest of orderly procedure, all orders for the division of business necessary to resolve the situation thus created.

A Circuit Judge designated under Section 22 does not act under the designation as a Circuit Judge. His powers within the purview of the judicial functions essential to the performance of his designated duties are no greater or less than those of his Associate District Judges. But he cannot possess *all* the powers, rights and duties of a District Judge, as is specifically provided under Section 22, and be denied the essential power *not* to agree to a division of business which excludes him from the discharge of his designated duties imposed by the same section. The power to agree upon a division of business is one of the powers of a District Judge, for it is specifically conferred by Section 27, and the power of disagreement is necessarily correlative thereto.

Judge Manton accordingly felt constrained to effect a distribution of business to the extent that the existing

disagreement with the other District Judges affected the performance of his designated duties (R. 178).

His order of division of business effected, not a grant of power, for that arises out of the statute authorizing the designation, but an explicit and orderly definition of the scope and intent of the power expressed in the order of designation and was made in accordance with the procedure prescribed by Section 27.

The argument of the petitioner that the order of designation constituted Judge Manton a District Judge so as to be governed by a distribution of business effected by his fellow Judges, but that he was stripped of all rights and powers of a District Judge essential to the performance of the judicial duties specified in the same order of designation by reason of "calendar" rules, which can derive no validity other than by agreement of the District Judges affected thereby, is wholly untenable. Yet, in the absence of the order of division of business prescribed by Section 27 under conditions of disagreement, it might possibly have been contended that the order of designation was intended to be merely conditional and subordinate to Rules 1-a and 11-a. The definite declaration of the order of division serves therefore the essential purpose of making entirely clear that the designee of the Senior Circuit Judge did not come into the District Court in subordination to rules nullifying his designated powers, but with the clear intent and power of performing his full statutory duty.

CONCLUSION.

The decision and decree of the Circuit Court of Appeals, reversing the decrees of the District Court, should be affirmed.

Respectfully submitted,

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